No. 93-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10
Associated General Contractors, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992) 6
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 2, 3, 4, 5
Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), cert. denied, 111 S. Ct. 516 (1991) .. 6
Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 112 S. Ct. 875 (1992) 6
Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992) .. *passim*
Hazelwood School District v. United States, 433 U.S. 299 (1977) 5
Johnson v. Transportation Agency, 480 U.S. 616 (1987) 5
Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986) 5
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 10
Shaw v. Reno, 113 S. Ct. 2816 (1993) 3
Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992) ..... *passim*
United States v. Albrecht, No. 80 C 1590 (N.D. Ill. Aug. 23, 1985) 3
United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978) 8
United States v. Paradise, 480 U.S. 149 (1980) 5, 7
Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992) 5
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 3, 5

ARGUMENT

In their brief in opposition to the petition for certiorari, respondents attempt to obscure the significance of the holdings of the en banc court of appeals. While respondents note that these rulings are interlocutory, that fact is of no practical significance—this is a decision of the en banc court which will control all subsequent cases in the circuit, including a subsequent appeal after remand. Waiting until this case is no longer in an interlocutory posture will accomplish nothing; until this Court reviews the questions presented by the petition, the holdings below will stand, sowing confusion and uncertainty in other circuits, and almost completely circumscribing the ability of public employers in the Seventh Circuit to redress prior discrimination voluntarily.

1. We explain in the petition that the first holding below—that a consent decree is irrelevant when assessing a public employer's justification for engaging in affirmative action in order to comply with that decree—is inconsistent with *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992), and *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992). In both of these cases, the court assessed the employer's justification for entering a consent decree, found it to be sufficient, and then weighed the employer's legitimate interest in complying with the decree when determining the permissibility of the employer's justification for race-conscious affirmative action. See 951 F.2d at 450-53; 933 F.2d at 456-61.[1]

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[1] Respondents accuse us of switching positions on this issue: they argue that when the City made the promotions at issue, it treated the consent decree as direct evidence of prior discrimination, while in the courts below, the City also relied on the history of the litigation leading to the consent decree. Even the majority below discerned no such change in the City's position. It left undisturbed the panel's finding that the City has always relied on the history of the litigation leading to the consent decree as one of its justifications for concluding that it had a constitutionally sufficient basis to engage in affirmative action. See Pet. App. 40a-41a.

Respondents attempt to torture the holding below so that it is not in conflict with *Stuart* or *Donaghy,* by asserting that the majority's holding on the significance of the consent decree is "directed as much toward *Croson*'s 'narrowly tailored' prong," Respondents' Brief In Opposition at 22, as it is to an employer's permissible justifications for concluding that affirmative action is warranted. Of course, by using this artful turn of phrase—"as much as"—respondents tacitly concede that the holding below did reject reliance on the consent decree as a permissible justification for engaging in affirmative action. Indeed, when the majority below assessed the City's permissible justifications for engaging in race-conscious affirmative action, it mentioned the consent decree not at all. Pet. App. at 6a-14a. Nor do respondents deny that this approach to a consent decree is squarely inconsistent with *Stuart* and *Donaghy.* In short, a reading of the opinion below that squares it with *Donaghy* and *Stuart*'s holdings—a public employer's need to comply with a consent decree it had justifiably entered is appropriately considered when assessing the propriety of affirmative action—is not remotely plausible.

Respondents suggest that the consent decree should be disregarded because in the seven years since its entry the conditions that had given rise to the need for the affirmative action called for in that decree had evaporated. See Respondents' Brief In Opposition at 22-23. Even the majority below did not embrace such an argument. As we explain in the petition, the consent decree contained a "long-range goal" requiring the City "to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made." Pet. App. at 21a. This provision plainly requires race-conscious affirmative action, and equally plainly requires the City to take such action until the racial imbalances that existed at the time of the

decree's entry have been rectified. As we explain in the petition, when the promotions at issue were taken, the City had not come close to remedying the imbalance to which the decree was addressed—in fact the imbalance had become even worse at the rank of captain because of the City's unjustifiable use of a stale, all-white promotional list. Pet. at 5-6.[2]

Contrary to respondents' assertion, Respondents' Brief In Opposition at 23, it is not our view that the consent decree forecloses an aggrieved plaintiff from attacking the propriety of action undertaken in order to comply with that decree. The constitutional test for whether a public employer has a sufficient justification to engage in affirmative action is not whether there is a consent decree that calls for affirmative action, but rather, whether the employer has a "strong basis in evidence for its conclusion that affirmative action was necessary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion)). See also *Shaw v. Reno*, 113 S. Ct. 2816, 2831-32 (1993). Our submission is that if an employer had "a strong basis in evidence" for its conclusion that it should enter a consent decree calling for race-conscious affirmative action because of the likelihood that, absent settlement, such a remedy would be judicially imposed, then the employer surely has a concomitant "strong basis in evidence" for its subsequent conclusion that it is justified in engaging in race-conscious affirmative action in order to comply with

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[2] Nor could anyone plausibly claim that the City could have concluded that it no longer had to comply with the decree in light of intervening legal developments. In 1985 the United States sought to modify the consent decree in order to remove the portions requiring race-conscious promotions. The district court denied the motion. *United States v. Albrecht*, No. 80 C 1590 (N.D. Ill. Aug. 23, 1985). The United Sttaes did not appeal. Chicago Fire Fighters R. 71 at Exh. H. Thus, the decree remained in force and the City was required to obey it on pain of contempt. Pet. App. at 37a-38a n.8.

that decree and, thereby, to redress the discrimination that gave rise to the decree.

Our position thus reflects the view taken by the First Circuit in *Stuart* and the Eighth Circuit in *Donaghy*. The dissenting judges below took this view as well: they analyzed the evidence confronting the City at the time it decided to enter the consent decree, and concluded "that the City of Chicago's assessment that its policies violated the Constitution was a realistic one." Pet. App. at 36a. But the majority below refused to even consider whether the City had a strong basis in evidence for concluding that it should enter and then comply with the consent decree. That holding leaves public employers in the untenable position where they could have been fully justified in entering a consent decree calling for race-conscious affirmative action, but are not permitted to advance their need to comply with such a consent decree when that affirmative action is later challenged. If a public employer justifiably enters a consent decree calling for race-conscious affirmative action, then surely the Constitution permits the public employer to comply with that decree. Under the opinion below, however, the law in the Seventh Circuit does not.

2. In defending the majority's rejection of statistical evidence as part of a public employer's rationale for determining that it is warranted in engaging in affirmative action to correct prior discrimination, respondents argue that while statistical evidence of a "manifest racial imbalance" may justify affirmative action under Title VII, "[w]hen an affirmative action plan is challenged on constitutional grounds, as is the case here, the manifest imbalance test is wholly inappropriate," Respondents' Brief In Opposition at 24.

This position can be squared with neither this Court's precedents nor the law in other circuits. In *Croson* itself, this Court recognized that "[t]here is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of

a pattern of practice of discrimination.' " 488 U.S. at 501 (quoting *Hazelwood School District v. United States,* 433 U.S. 299, 307-08 (1977)). Accord *Wygant,* 476 U.S. at 274-75 (plurality opinion); *id.* at 292 (O'Connor, J. concurring in part and concurring in the judgment). On at least two other occasions, this Court has relied in part on statistical evidence of manifest racial imbalances between an employer's workforce and the racial composition of the qualified labor pool in upholding race-conscious affirmative action under the strict scrutiny test. See *United States v. Paradise,* 480 U.S. 149, 167-69 (1980) (plurality opinion); *Local 28 of the Sheet Metal Workers' International Association v. EEOC,* 478 U.S. 421, 440-42, 480-81 (1986) (plurality opinion); *id.* at 484-88 (Powell, J., concurring in part and concurring in the judgment). As authority for their position, respondents cite only footnotes in *Johnson v. Transportation Agency,* 480 U.S. 616 (1987), and those footnotes, curiously, only point out that *Johnson* presented no constitutional issue for the Court to decide. See *id.* at 620 n.2, 630 n.8, 633 nn. 10 & 11.

The law in other circuits is quite clear concerning the propriety of statistical evidence of racial imbalance when assessing a public employer's justification for concluding that some measure of affirmative action is required to redress prior discrimination. In *Vogel v. City of Cincinnati,* 959 F.2d 594 (6th Cir. 1992), the court wrote: "Evidence of wide statistical disparities, however, may justify an affirmative action policy adopted by a public employer." *Id.* at 599. The court sustained the affirmative action plan in that case by comparing the racial composition of the Cincinnati police to the racial composition of the qualified labor pool. See *id.* at 599-600. In *Stuart v. Roache,* the court rejected Stuart's attack on the statistical evidence utilized to justify Boston's affirmative action plan: "Plaintiffs, however, misinterpret the *Croson* Court's rationale for dismissing the significance of statistical evidence in that case." 951 F.2d at 450. Statistical evidence comparing the racial composition of a promotional rank

with the composition of the pool of persons qualified for promotion to that rank, in the court's view, supplied a constitutionally sufficient justification for the affirmative action plan at issue. See *id.* at 451-52. In *Donaghy,* the court approved of the affirmative plan at issue in part because the City "demonstrated that the plan was a response to a conspicuous racial imbalance in its workforce." 933 F.2d at 1460. To similar effect, see *Associated General Contractors, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1414-15 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992); *Coral Construction Co. v. King County,* 941 F.2d 910, 918-19 (9th Cir. 1991), cert. denied, 112 S. Ct. 875 (1992); *Cone Corp. v. Hillsborough County,* 908 F.2d 908, 915-16 (11th Cir.), cert. denied, 111 S. Ct. 516 (1991).

Respondents suggest that statistical proof may be permitted even under the majority's opinion below "if the city can muster competent evidence of either post-1972 statutory violations or pre-1972 constitutional violations," Respondents' Brief In Opposition at 25. But the precise type of statistical evidence that, under this Court's decisions and the law in other circuits, is appropriate to establish a prima facie case of unconstitutional discrimination —comparisons between the racial composition of a promotional rank and the racial composition of those qualified for promotion—have already been branded by the majority below as "no evidence" of unconstitutional pre-1972 discrimination, Pet. App. at 13a. And because, as the majority below correctly observed, it "is implausible" that any significant amount of the statistical imbalance within the Chicago Fire Department is due solely to discrimination occurring between the point in 1972 where Title VII became applicable to the City, and the point in 1974 when the first consent decree was entered, Pet. App. at 12a-13a, the narrow time frame in which the majority below is willing to consider statistical evidence is of no practical significance.

Respondents' complaint that the statistical evidence presented by the City is a "confusing array," Respondents'

Brief In Opposition at 25, is also impossible to reconcile with the precedents. The statistical evidence in the record —comparing the racial composition of each promotional rank to the racial composition of the rank eligible for promotion, see Pet. at 4-8—is precisely the type of statistical comparison on which the First Circuit relied in *Stuart*, and the Eighth Circuit relied in *Donaghy*, in upholding affirmative action plans for police promotions. For that matter, such inter-rank comparisons were relied upon by this Court in *Paradise*, in which it noted that inter-rank comparisons demonstrated that "[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a department hierarchy dominated exclusively by nonminorities." 480 U.S. at 168 (plurality opinion). The same is true here. As the dissenting judges below explained—without factual contradiction from the majority—the Chicago Fire Department's discriminatory hiring practices effectively prevented minorities from even entering the Department until the late 1970's, when they finally began to be hired in significant numbers, and the Department's discriminatory promotional practices, which were not eradicated until the 1980 consent decree, further prevented minorities from advancing in the Department. Pet. App. at 18a-22a. Even respondents never claim that the gross racial disparities between the ranks were the product of some nondiscriminatory statistical fluke—plainly they are the product of practices that the United States successfully sought to enjoin.

In *Stuart*, the First Circuit explained the relevance of statistical evidence of inter-rank racial disparities:

> In the present case, however, the "comparison" figures do not appear to reflect simply general "societal" discrimination. The Decree compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimal qualifications needed to become sergeants. The fact that, of the latter pool, 4.5 percent of the officers are black, as opposed .45 percent who became sergeant, at least cast doubt on the fairness

> of the promotion process and requires further explanation.

951 F.2d at 451. After noting that the record showed that the Boston Police Department had hired few blacks until the 1970's, the court added:

> One obvious reason, then, why there may have been few black sergeants in the Boston Police Force in 1978 is that the Department had not hired many black police officers before 1970. Since unjustified discrimination accounted for the latter fact, the latter fact cannot excuse the former.

Id. at 452.

Respondents speculate that here there may be some "innocent causes" for the gross statistical disparities found in this record, Respondents' Brief In Opposition at 26, but they supply no such explanation, and none can be found in the record. There is no suggestion in the record either that minorities do not wish to join the Chicago Fire Department, or that they do not wish to seek promotion once in it.[3] The record shows that once discriminatory hiring practices ended, minorities eagerly sought to be hired and promoted. Indeed, there is no affidavit or other evidentiary material in the record suggesting any "innocent explanation" for these gross statistical disparities. The majority below speculated, without record support, that "the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree." Pet. App. at 11a. This is the

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[3] Respondents attempt to dispel the inference of unconstitutional discrimination these statistics create by noting that in the original discrimination case brought by the United States, the district court found that the United States had failed to prove that the City had intentionally discriminated against minorities. Respondents' Brief In Opposition at 25 n.16. But the judgment of the district court was reversed on appeal, and the court of appeals found it unnecessary to reach the constitutional claims because it provided the United States with all the relief it sought on statutory grounds. See *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). Thus the district court's unreviewed finding counts for quite little.

only "innocent explanation" for these gross disparities ever advanced (though not by a party) in this litigation. And yet, as amici the National Urban League and Chicago Urban League point out, the district court imposed that minority hiring requirement solely to redress prior unlawful discrimination, and its order required that only qualified minorities be hired. The fact that a court had ordered the City to hire qualified minorities in order to redress prior discrimination hardly "taints" the composition of the pool of firefighters qualified for promotion with unqualified minorities.

3. We also point out in the petition that the affirmative action promotions at issue were narrowly tailored because minorities were promoted in close approximation to their representation in the qualified labor pool, and the minorities promoted had test scores statistically indistinguishable from the nonminorities who were passed over. We also point out that two circuits have held that employers may depart from strict rank order use of an employment examination in order to reduce the adverse impact of the examination, when the minority candidates who are benefitted have qualifications statistically indistinguishable from the nonminority candidates they pass over. Pet. at 28-29. The Seventh Circuit's holding that a departure from strict rank order in itself creates a genuine issue of fact as to whether the City had some invidious motive to favor minorities is inconsistent with those decisions.

Respondents note that the City may be able to prove at trial that it did depart from rank order use from the promotional examinations at issue for appropriate reasons. See Respondents' Brief In Opposition at 28-29. But they ignore the impact of the majority's holding that speculation alone creates a genuine issue of fact. In their brief, respondents identify no evidence in the record that supports the majority's speculation that the City's actual motive for engaging in affirmative action was "to curry favor with" minorities. See Pet. App. at 14a.[4] We know

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[4] Indeed, respondents' position on this point diverges sharply from the position they took in both the district court and the court

of no such evidence. And it is settled law that a party may not avoid summary judgment through mere speculation. A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

Any plaintiff, of course, can speculate that an employer's motive for engaging in affirmative action is to curry favor with minorities. If such speculation is sufficient to survive summary judgment, then, as we explain in the petition, every affirmative action case must be tried. No matter how clear the documentary evidence is supporting an affirmative action plan, an employer can take no affirmative action without the risk of enormous backpay awards when, years later, a jury makes ad hoc employment policy for that employer. If affirmative action necessarily carries such enormous legal risks and uncertainties, as a practical matter it surely will be doomed. And with its demise, the ability of employers to redress voluntarily discrimination at the promotional level (where race-neutral means like more active recruitment of minorities cannot be utilized) will also disappear. If employers wish to ameliorate the effects of prior discrimiation at the upper ranks, they must either wait until all incumbents retire, or wait to be sued and lose on the merits. Affirmative action as such will be effectively abolished, a step even the majority below recognized this Court is not prepared to take. Pet. App. at 5a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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of appeals. In both courts, they argued that there were no genuine issues of fact in this case.

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